

NTSB Order No. EA-3796

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of February, 1993

Docket SE-11016

the Federal Aviation Regulations (FAR),² as alleged in the Administrator's order suspending respondent's airline transport pilot certificate (which served as the complaint), but modified the period of suspension from 60 days to 30 days.³

In his answer to the complaint, respondent admitted that on June 16, 1989, he acted as pilot in command of a Piper PA 30 aircraft on a VFR flight from Lewistown, Montana to Los Angeles, California. He admitted that he operated the aircraft within the Salt Lake City Airport Radar Service Area (ARSA) without first establishing two-way radio communication with air traffic control (ATC), but asserted that any violation of FAR 91.88(c) was excusable. He denied that this operation was careless so as to endanger the lives and property of others, or that it was a violation of FAR 91.9.

² Section 91.88(c) [now 91.130(c)] provided:

§ 91.88 Airport radar service areas.

(c) **Arrivals and Overflights.** No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with ATC prior to entering the area and is thereafter maintained with ATC while within that area.

Section 91.9 [now § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ The Administrator has not appealed from the reduction in sanction.

In his letter to the FAA inspector who investigated this case (attached to, and incorporated by reference into, respondent's answer to the complaint) respondent stated that he was attempting to avoid the Salt Lake City ARSA by continuing along V257 (which passes to the west of the Salt Lake City ARSA) and then intercepting and following the VOR Radial for Fairfield (which lies directly south of the ARSA). However, when respondent saw a passenger jet taking off from what could only be Salt Lake City International Airport, he realized he was "well off course." Respondent explained in the letter that this deviation was due to his misreading of the VOR frequencies listed on the enroute low altitude chart he was navigating with:

I found I had inadvertently tracked inbound toward SLC [Salt Lake City] rather than FFU [Fairfield]. My first error was in misreading the frequency for FFU to be 116.8, actually the frequency for SLC, rather than 116.6. . . . My second error was in not checking the identifier for FFU but I was, after all, flying VFR and I believed I had a visual identification of Salt Lake City appropriate to the point I intercepted (I thought) the inbound radial I was seeking. In retrospect I believe I saw Ogden from altitude, not Salt Lake City.

(See Respondent's [labeled "Defendant's"] Exhibit F at 2-7.)

Prior to the hearing, the law judge granted summary judgment on the alleged 91.88(c) violation, leaving only the alleged 91.9 violation and the appropriate sanction to be disposed of at the hearing. After hearing testimony and legal arguments on these points, the law judge determined that respondent's entry into the Salt Lake City ARSA was in violation of 91.9, noting Board precedent which holds that penetration of an ARSA or TCA

(terminal control area) is inherently dangerous. He further held that, because the 91.9 violation was purely residual (in that it was based solely on respondent's violation of 91.88(c)), it did not warrant any sanction in and of itself. Noting that there was no actual endangerment in this case, as well as respondent's prior participation in aviation safety clinics, the law judge found that a 30-day suspension of respondent's airline transport pilot certificate would adequately protect the public interest and would serve as a sufficient deterrent in this case.

On appeal, respondent argues that the law judge erred in granting summary judgment on the 91.88(c) charge because respondent was thereby precluded from presenting an affirmative defense. In respondent's view, the law judge's order precluded him from presenting any defense -- even physical incapacity or sudden emergency -- to that alleged violation. Respondent also challenges the law judge's finding that the 91.88(c) violation was sufficient to support a 91.9 violation, arguing that he was thus foreclosed from offering any defense to that charge as well.

The Administrator argues in reply that respondent was not denied an opportunity to present a defense to the 91.88(c) charge. Rather, his defense, as described in his answer to the complaint and his answer to the Administrator's motion for summary judgment (that a "hazardous radio navigation situation" exists in the Salt Lake City area in that the numbers assigned to the VOR frequencies are too similar), was simply inadequate. The Administrator also argues that Board precedent supports the law

judge's conclusion that respondent's violation of 91.88(c) was sufficient to support a residual violation of 91.9. For the reasons discussed below, we deny respondent's appeal and affirm the initial decision.

FAR 91.88(c) violation.

Respondent was not denied an opportunity to assert an affirmative defense to the 91.88(c) charge. To the contrary, as described above, respondent set forth in his answer to the complaint (and in his answer to the Administrator's motion for summary judgment) what he saw as the exonerating circumstances of his ARSA penetration. However, those circumstances do not constitute a complete defense, but only show that the violation was inadvertent. Contrary to respondent's apparent belief that his desire to comply with the regulation should be a complete defense (App. Br. at 4), the fact that respondent's violation was inadvertent as opposed to deliberate is relevant only to the issue of sanction. The law judge correctly found that respondent's claim (that the similarity in two VOR frequencies was the cause of his deviation) was unavailing as a complete defense.⁴

⁴ In this regard, we note that even if it could be shown that (as respondent suggests) other pilots have made the same mistake respondent made, we would still find that respondent violated FAR 91.88(c) and 91.9. See Administrator v. McAnulla, NTSB Order No. EA-3090 (1990), at 7, where we upheld violations of FAR 91.88(c) and 91.9 although several other pilots had apparently made the same mistake respondent made in that case: relying solely on the terminal area chart (which did not set forth the requirement for establishing two-way communication with

FAR 91.9 violation.

Board precedent supports the law judge's determination that a violation of FAR 91.88(c) is sufficient to support a finding of a residual violation of FAR 91.9.⁵ Respondent was foreclosed from offering a defense to the 91.9 charge only in the sense that, because it was residual (i.e. based solely on the underlying 91.88(c) violation), the only complete defense to such a charge would be a complete defense to the underlying violation.

Respondent had every opportunity to show (and indeed succeeded in establishing) that he did not commit an independent violation of 91.9.

While the law judge could properly have granted summary judgment on the residual 91.9 charge as well as the alleged violation of 91.88(c), his denial of summary judgment on that charge might well have been intended as a means of insuring that respondent would have an opportunity at the hearing to show that

(..continued)

ATC prior to entry into the ARSA) for communications information.

⁵ Administrator v. Hemphill, NTSB Order No. EA-3703 (1992) at 4-5 (91.9 violation reinstated because, "respondent created a potentially dangerous situation by entering an ARSA without establishing two-way radio contact"); Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at 8 and Administrator v. Thompson, NTSB Order No. EA-3247 (1991) at 5, n. 7 ("the finding of a violation of an operational FAR provision (such as §91.90(b)(1)(i) [prohibiting unauthorized operation within a TCA]) without more is sufficient to support a finding of a "residual" or "derivative" §91.9 violation"); Administrator v. Demar, 5 NTSB 1412, 1417 ("any entry into controlled airspace without a clearance to do so carries with it an unacceptable potential for hazard in light of the fact that separation in controlled airspace is provided by ATC, not by the 'see and be seen' concept").

there was no independent violation, and thus no additional sanction was warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of respondent's airline transport pilot certificate shall commence 30 days after the service of this opinion and order.⁶

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶ For the purpose of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).